

**Bodge Electrical Contractors, Inc. and International
Brotherhood of Electrical Workers, Local 43.**
Case 3-CA-17635

January 31, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On September 2, 1994, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel filed a limited exception and a memorandum in support of the exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and the memorandum in support of the exception and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified below.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bodge Electrical Contractors, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order except that the attached notice is substituted for that of the administrative law judge.

¹ The General Counsel has excepted to the judge's omission from his recommended notice of the affirmative actions required of the Respondent—that it offer employment to Frederick Schulze and make him whole for any earnings lost by reason of the Respondent's discrimination against him. We find merit in the General Counsel's exception.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in International Brotherhood of Electrical Workers, Local 43, or any other labor organization, by discriminatorily refusing to consider for employment or refusing to hire job applicants, or in any other manner discriminating against employees with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Frederick Schulze immediate and full employment to the electrician position for which he applied, or if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and we will make him whole for any loss of earnings and benefits that he may have suffered from the date of his application for employment until the date he is offered employment.

WE WILL expunge from our files any reference to the failure and refusal to hire or consider Frederick W. Schulze for employment, and notify him in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him.

BODGE ELECTRICAL CONTRACTORS, INC.

Ron Scott, Esq., for the General Counsel.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Syracuse, New York, on August 5, 1994. The charge was filed on February 8, 1993, by International Brotherhood of Electrical Workers, Local 43 (the Union).¹ The complaint, which initially issued on March 25, alleges that Bodge Electrical Contractors, Inc. (the Company or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The gravamen of the complaint is that on or about January 26 the Company allegedly refused to hire Frederick W. Schulze because of his union membership.

The Company subsequently entered into an informal settlement agreement, which was approved on October 29. The Company failed to comply with the terms of that settlement agreement. Therefore, the Regional Director issued an order vacating the settlement agreement and reissuing the complaint.

The Company filed an answer denying the commission of the alleged unfair labor practices. The Company is presently in bankruptcy. The Company and the trustee in bankruptcy declined either to withdraw the answer or to appear at the hearing. General Counsel was the only counsel to enter an appearance at the hearing. General Counsel presented its evidence and oral argument and waived the filing of a brief, but submitted a position letter.

Upon the entire record in this case,² and from my observation of the demeanor of the only witness, and having considered the positions of the parties, I make the following

¹ All dates herein are for 1993 unless otherwise indicated.

² Certain errors in the transcript have been noted and corrected.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a corporation with an office and place of business in Watertown, Connecticut and at various project locations in New York State, including a project at Warner's Rest Stop, west of Syracuse, New York, on the New York State Thruway (jobsite), has been engaged as an electrical contractor in the building and construction industry. In the conduct of its business, the Company during 1993 purchased and received at the jobsite, goods and materials valued in excess of \$50,000 directly from points outside the State of New York. I find, as the Company admits, that, at all times material to this proceeding, it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Frederick Schulze, General Counsel's only witness, testified in sum as follows: He is a journeyman electrician, and has worked at the trade since 1977. In late January, he responded to a want ad in a Syracuse, New York newspaper seeking commercial electricians with 5 years' experience. Schulze had such qualifications. He called for and arranged for an interview at the jobsite. When he arrived at Warner's Rest Stop on January 25 or 26, he was directed to the Company's trailer. The person who appeared to be in charge identified himself as being with the Company, and told Schulze that he was at the right place for an interview.

Schulze further testified in sum as follows: He filled out a job application, and gave the interviewer his three-page resume. The last page included a copy of Schulze's current IBEW dues' receipt. The interviewer asked questions about Schulze's prior employment. The interviewer then referred to the last page of Schulze's resume, saying: "you're union? I can't use you, you're union. I can't hire anybody from the union." Schulze explained that the Union told him that they had no problem with his working for the Company because the Company was paying the prevailing wage rate. The interviewer responded by making derogatory remarks about the Union, and insisted that he was not going to hire union. Schulze left, leaving his application with the interviewer. He did not thereafter hear from the Company.

I credit Schulze's uncontroverted testimony. On the basis of that testimony, General Counsel presented a *prima facie* case that the Company failed and refused to hire Schulze because of his union membership. As the Company gave no other explanation for rejecting Schulze's application, it follows that the Company failed to meet its burden of establishing that it would have failed or refused to hire him in the absence of such membership. The Company thereby violated Section 8(a)(1) and (3) of the Act. *Presbyterian University Hospital*, 295 NLRB 1139 (1989), *enfd.* 914 F.2d 244 (3d Cir. 1990); *Young Hinkle Corp.*, 244 NLRB 264, 267 (1979).

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily failing and refusing to hire Frederick Schulze, thereby discouraging membership in the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing potential employees in the exercise of the rights guaranteed them in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence does not indicate that the Company was hiring employees with any limitation as to a particular job or other condition. Therefore, the usual remedy of an offer of employment and backpay is appropriate. I shall leave for the compliance stage of this proceeding, the matter of whether the Company is permanently out of business, or otherwise incapable or not required to comply with any remedy provisions.

Having found that the Company discriminatorily failed and refused to hire Frederick W. Schulze, I am recommending that the Company be ordered to offer him employment to the electrician position for which he applied, and make him whole for any loss of earnings and benefits that he may have suffered from the date of his application for employment with the Company to the date of the Company's offer of employment.

I shall also recommend that the Company be ordered to expunge from its records any reference to the failure and refusal to hire or consider Schulze for employment, to give him written notice of such expunction, and to inform him that this unlawful conduct will not be used as a basis for further personnel actions against him. See *Sterling Sugars*, 261 NLRB 472 (1982). Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³ It will also be recommended that the Company be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay due.

³ Under *New Horizons*, interest on and after January 1, 1987 is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Bodge Electrical Contractors, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Brotherhood of Electrical Workers, Local 43, or any other labor organization, by discriminatorily refusing to consider for employment or refusing to hire job applicants, or in any other manner discriminating against employees with regard to their hire or tenure of employment or any term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Frederick Schulze immediate and full employment to the electrician position for which he applied, or if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any losses he suffered by reason of the discrimination against him as set forth in the remedy section of this decision.

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Expunge from its files any reference to the failure and refusal to hire or consider Schulze for employment, and notify him in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Watertown, Connecticut office and place of business, and at its jobsites within a 50-mile radius of Syracuse, New York, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."